IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

COMPANY PETITION No. 43 of 2006

For Approval and Signature:

HONOURABLE MR.JUSTICE M.R. SHAH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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ICICI BANK LTD. - Petitioner(s)
Versus
SURBHI MILK FOOD AND BEVERAGESLTD. - Respondent(s)

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Appearance :
MR TV SHAH for Petitioner(s) : 1,
None for Respondent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE M.R. SHAH

Date : 15/11/2006

ORAL JUDGMENT

By way of this petition, the applicant has prayed for an appropriate order of winding up of the respondent company under section 433 and 434 of the Companies Act (for short “the Act”).

2. It is the contention on behalf of the petitioner that the petitioner has served the statutory notice upon the respondent company as required under section 434 of the Act on 26th July 2005 and in support of the same, he has relied upon xerox copy of the acknowledgment of service of statutory notice which are produced along with the affidavit dated 24th April 2006 (page 37 and 38). It is the contention of the petitioner that the statutory notice has not only been served upon the respondent company but the same is also served upon the Directors of the company and the same has been accepted by one Jayshri Brahmbhatt. It was pointed out to the learned counsel appearing for the petitioner that on the basis of the aforesaid acknowledgment, it cannot be said that statutory requirement of service of notice as required under section 434 of the Act have been complied with and that there is no proper service of statutory notice upon the respondent company and/or its agent. Shri Tarun V. Shah, learned advocate appearing on behalf of the petitioner company has relied upon the affidavit in support of the petition dated 5th October 2006 (page 48 and 49) and it is submitted that the winding up notice under sections 433(e) and 434 of the Act was issued at

the registered office of the opponent company and the same was accepted by Jayshri Brahmbhatt, relative of one of the Directors of the opponent company Shri R.R. Brahmbhatt. To demonstrate that said Shri R.R. Brahmbhatt is the Director of the opponent company, he has relied upon one communication dated 20th September 2006 (page 50). He has also relied upon para 3 and 7 of the said affidavit and has submitted that the said notice has to be served on the company by “Causing it to be delivered at its Registered Office by Registered Post” and when the applicant has sent the notice by Registered Speed Post at the Registered Office of the opponent company and the postal authorities has returned the acknowledgment duly singed by Jayshri Brahmbhatt, there shall be a presumption under the provisions of the Act that there was a proper service of notice and therefore, it is requested to issue notice upon the respondent company. He has relied upon judgment of Calcutta High Court in the case of Smt. Kanak Lata Ghose V. Amal Kumar Ghose reported in AIR 1970 Calcutta, page 328 in support of his above submission. He has also relied upon section 27 of the Indian Evidence Act.

3. Section 434 of the Companies Act reads as under:

434(1) A company shall be deemed to be unable to pay its debts-

(a) if a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding five hundred rupees then due, has served on the company, by causing it to be delivered at its registered office, by registered post or otherwise, a demand under his hand requiring the company to pay the sum so due and the company has for three weeks thereafter neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor,

(b) if execution of other process issued on a decree or order of any Court in favour of a creditor of the company is returned unsatisfied in whole or in part; or

(c) if it is proved to the satisfaction of the Court that the company is unable to pay its debts, and, in determining whether a company is unable to pay its debts, the Court shall take into account the contingent and prospective liabilities of the company.

(2) The demand referred to in clause (a) of sub section (1) shall be deemed to have been duly given under the hand of the creditor if it is signed by any agent or legal adviser duly authorized on his behalf, or in the case of a firm, if it is signed by any such agent or legal adviser or by any member of the firm."

Now considering section 434 (1)(a) read with sub section (2), a company shall be deemed to be unable to pay its debts if a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding five hundred rupees then due, has served on the company, by causing it to be delivered at its registered office, by registered post or otherwise, a demand under his hand requiring the company to pay the sum so due and the company has for three weeks thereafter neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor. As per sub-section (2) of section 434, the demand referred to in clause (a) of sub section (1) shall be deemed to have been duly given under the hand of the creditor if it is signed by any agent or legal adviser duly authorized on his behalf. Thus, a notice of demand is required to be served upon the company by causing it to be delivered at its registered office, by registered post or otherwise and if the acknowledgment is singed by any agent or legal adviser duly authorized on his behalf, then the same can be said to be a valid demand as required under section 434 of the Act. In the present case, admittedly, the acknowledgment which is relied upon by the petitioner is not having any seal of the respondent company. The same

is signed by one Jayshri Brahmbhatt. In the petition, nowhere it has been mentioned that said Jayshri Brahmbhatt is the agent of the respondent company and/or is/was authorized to accept the notice on behalf of the respondent company. Under the circumstances, it cannot be said that statutory requirement as required under section 434 of the Act with regard to service of demand upon the respondent company has been complied with. By considering the acknowledgment receipts at page 37 and 38, it cannot be said that statutory requirement with regard to service of notice as required under section 434 of the Act has been complied with. Under the circumstances, the present petition cannot be entertained.

4. So far as the judgment relied upon by the learned counsel appearing on behalf of the petitioner in the case of Smt. Kanak Lata Ghose (supra) is concerned, the same will not be applicable in the facts and circumstances of the present case. In the said case, the controversy was that a certificate was issued by the postal authorities with regard to posting and delivering the letters and that the presumption was drawn. In the present case, as stated above, the statutory requirement is service of notice upon the respondent company and/or its agent. As

stated above, neither there is a seal of the respondent company on the acknowledgment nor it is specifically mentioned by the petitioner that said Jayshri Brahmbhatt whose signature is found on the acknowledgment, was not authorized to accept the notice on behalf of the respondent company and/or was agent of the respondent company.

5. Now so far as reliance placed upon section 27 of the Indian Evidence Act is concerned, in the facts and circumstances narrated hereinabove, there is no question of drawing the presumption. Section 27 of the Evidence Act would be applicable, where there is no other evidence and the presumption is to be drawn. In the present case, the acknowledgment is there but not signed by the authority and/or agent and it cannot be said that the save is in consonance with section 434 of the Act. Under the circumstances, reliance placed upon section 27 of the Indian Evidence Act is misplaced.

6. Under the circumstances, the present company petition is dismissed. It is required to be noted at this stage that it was suggested that instead of inviting order, the petitioner may issue fresh notice upon the

respondent company to avoid any technicality, however, the learned counsel appearing on behalf of the petitioner invited the order and therefore, this Court has passed the aforesaid order.

Under the circumstances, while dismissing the present company petition, it is observed that it will be open for the petitioner to serve statutory notice upon the respondent company as required under section 434 of the Act and to file a fresh company petition.

(M.R.SHAH,J.)

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